No. 92-519

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, JIM SMITH, Secretary of State of the State of Florida, T. K. WETHERELL, Speaker of the Florida House of Representatives, and PETER R. WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives,

Appellants,

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POZO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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BRIEF AMICI CURIAE OF LEWIS N. DODAK, SPEAKER OF THE MICHIGAN HOUSE OF REPRESENTATIVES, AND GIBSON D. LEWIS, SPEAKER OF THE TEXAS HOUSE OF REPRESENTATIVES, IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

Whether a state-enacted reapportionment plan violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it does not maximize the electoral opportunities of a class of minority plaintiffs, notwithstanding that the plan provides the minority class with the opportunity to elect representatives in numbers at least equal to the class's proportion of the population?

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INTEREST OF AMICI

The States of Michigan and Texas, like all other States, must reapportion their legislative districts following each decennial census.[1] These States are committed to the letter and spirit of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The present case is important to these *Amici* because it presents an opportunity for this Court to resolve basic Section 2 issues. Without clarification of what Section 2 requires, state legislatures will continue to face an uncertain legal landscape that inevitably affects their ability to exercise one of the most sovereign of all powers—the drawing of political districts.

INTRODUCTION

Following each decennial census, States must reapportion legislative districts.[2] Such legislative redistricting is at the core of a State's sovereignty. This Court has repeatedly held that the business of reapportionment is "a legislative task which the federal courts should make every effort not to preempt." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). *See also Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam); *White v. Weiser*, 412 U.S. 783, 794-95 (1973).

When redistricting, legislatures must accommodate a multitude of competing social, political, regional and ethnic interests. Often, dramatic demographic changes will have greatly altered the population distribution within the State and reshaped traditional political alignments. As this Court has repeatedly noted, "political considerations are inseparable from [this] districting and apportionment" process.[3]

[1] The parties have consented to the participation of *Amici*; letters of consent are on file with the Clerk.

[2] *See Reynolds v. Sims*, 377 U.S. 533 (1964); Fla. Const., Art. III, § 16(c); Michigan Const., Art. 4, § 6; Texas Const., Art. 3, § 28.

Despite these difficulties, *Amici* are committed to ensuring that all citizens have an equal opportunity to participate in the electoral process and elect representatives of choice, as Section 2 of the Voting Rights Act requires. The problem for state legislatures is that neither the text of Section 2, nor the decisions of this Court and lower federal courts interpreting that text, establish a *clear standard* for deciding whether a state legislative reapportionment plan provides equal electoral opportunity.[4] As Chief Judge Tjoflat of the Eleventh Circuit noted, the "amended section 2 means all things to all parties and therefore means nothing at all."[5]

This uncertainty inhibits the ability of States to enact reapportionment legislation in several ways.

First, uncertainty impedes the ability of a State to comply with legal requirements when it redistricts despite good faith efforts to do so. Court review is an inevitable

[3] *Davis v. Bandemer*, 478 U.S. 109, 128 (1986) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973)). *See also White v. Weiser*, 412 U.S. 783, 794-95 (1973).

[4] For example, federal courts are in substantial confusion with respect to the proper standard for analyzing vote dilution challenges to single-member districts. *See, e.g., Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990), in which the Eleventh Circuit *en banc* could not agree on how *Thornburg v. Gingles*, 478 U.S. 30 (1986)—the only decision of this Court which has addressed the appropriate standards to apply to Section 2 challenges since the Voting Rights Act was amended in 1982—should apply to single-member district challenges. *See also Barton v. Shohoen*, 793 F. Supp. 1329 (D.S.C. 1992) (three-judge court) ("it is not entirely clear to what extent *Gingles* applies to . . . single member districts"), *cert. den.*, 61 U.S.L.W. 3334 (U.S. 1992). As discussed in Point I, *supra*, there also is substantial confusion as to whether a State is required to maximize the number of majority-minority districts when it devises a redistricting plan.

[5] *Liberty County*, 899 F.2d at 1035 (Tjoflat, J., concurring).

final result, but state legislatures should have sufficient guidance, in the first instance, to do the job right themselves. As Chief Justice Rehnquist has observed, "legislators who embark on the difficult and politically sensitive task of reapportionment . . . need clear rules for determining whether a particular plan for a particular governmental district is or is not constitutional." *Uvalde Consol. Independent School Dist. v. United States*, 451 U.S. 1002, 1007 (1981) (Rehnquist, J. (now C.J.), dissenting from the denial of certiorari). If legislatures "are to have even a fighting chance of reapportioning themselves within constitutional limits, rather than to be remitted to court ordered redistricting, with all of the additional legal baggage which such plans bring with them, this Court should make every effort to clarify what the Voting Rights Act . . . require[s]." *Id.* at 1007-1008.

Second, that same uncertainty directly affects the deliberative processes of state legislatures attempting to make good faith efforts to comply with Section 2. Because the rules a lower court applies to Section 2 challenges are so uncertain, groups dissatisfied with the process of legislative accommodation can simply opt out of the process and hope to achieve a more favorable allocation of power in court. *See, e.g., Nash v. Blunt*, 797 F. Supp. 1488, 1506 (W.D. Mo. 1992) (three-judge court) (Sachs, J, concurring). This may account, in part, for the failure of many States to enact reapportionment legislation in the wake of the 1990 census.[6]

Third, when—as in this case—a state legislature is able to enact a redistricting plan, the confusion over Section 2 standards inevitably leads to intrusive federal

[6] *See, e.g., Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992) (imposing a plan in Wisconsin because the legislature was unable to enact a plan itself); *Emison v. Growe*, 782 F. Supp. 427 (D. Minn.) (three-judge court) (same in Minnesota), *probable jurisdiction noted sub nom., Growe v. Emison*, 112 S. Ct. 1557 (1992); *Wilson v. Eu*, 286 Cal. Rptr. 280 (S. Ct. 1992) (same in California).

court review. Because the law is so ill defined, a court's discretion during its review of a plan is almost unlimited. This results in exactly the type of "legislative task" preemption that this Court has repeatedly deemed improper:

> [it] too much embroil[s] the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from the legislative halls.

Davis v. Bandemer, 478 U.S. 109, 133 (1986) (plurality opinion).

ARGUMENT

I. RESOLUTION OF THE STANDARDS WHICH GOVERN A SECTION 2 VOTE DILUTION CHALLENGE IS REQUIRED.

Section 2 of the Voting Rights Act is intended to ensure that laws directly affecting the ability of a citizen to participate in the electoral process—such as reapportionment statutes—are not drafted or implemented in a discriminatory manner.[7] Section 2 thus prohibits imposition of any reapportionment plan that causes a class protected by the Act to "have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." 42 U.S.C. § 1973(b).

The difficulty for state legislatures attempting to promote the fundamental principles of the Act is that it is unclear exactly how the requisite "opportunity" should be gauged when the electoral practice at issue is the drawing of single-member districts.[8] As Justice O'Con-

[7] *See generally* S. Rpt. No. 97-417, 97th Cong., 2d Sess. at 6 (1982), *reprinted in* 2 U.S. Code & Admin. News 177, 183 (1982).

[8] If the electoral practice at issue is a bar to minority voter registration or some other device that impinges upon the ability of minority citizens to exercise their right to vote, it is much easier

nor recognized, "in order to decide whether [a reapportionment plan] has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) (O'Connor, J. concurring, joined by Burger, C.J., Rehnquist, J. (now C.J.) and Powell, J.). *See also Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002, 1012 (1984) (Rehnquist, J. (now C.J.) dissenting from summary affirmance) ("the phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained"); *Chisom v. Roemer*, 111 S. Ct. 2354, 2375 (1991) (Scalia, J., joined by Rehnquist, C.J. and Kennedy, J., dissenting).

Gingles enunciated a three-part test for establishing a *prima facie* Section 2 challenge to a multimember district plan.[9] The *Gingles* Court, however, declined to address

to gauge equal opportunity because any such bar would by definition afford to minority voters "less opportunity than other members of the electorate to participate in the political process." *See generally* S. Rpt. No. 97-417, *supra*, at 183. A multi-member district plan also may raise more straight forward issues because the multi-member district device itself may submerge the minority vote. *See, e.g., Connor v. Finch*, 431 U.S. 407 (1977). If that type of submergence has occurred, then, arguably, the vote of a member of a minority group has less weight than the vote of a member of the majority because the majority voter has the opportunity to elect multiple candidates while the minority voter has no effective opportunity to elect any candidates. *Cf. Reynolds v. Sims*, 377 U.S. 533 (1964). However, in the single-member district context, no voter has the opportunity to elect more than one candidate. In this context, it necessarily becomes much more difficult to gauge when the opportunity to elect a single candidate has degenerated into such a limitation on the ability to participate that a Section 2 violation should be deemed to have occurred.

[9] The first *Gingles* factor requires a determination that the minority population is sufficiently large and geographically compact to permit the creation of single member districts where the minority can elect candidates of choice. The second *Gingles* factor requires

the proper standard for assessing single-member district challenges. *See id.* at 46, n.12. State and federal courts attempting to apply *Gingles* have been extremely uncertain as to what *Gingles* requires in any context,[10] and have been particularly uncertain as to whether, and how, the *Gingles* standards apply to challenges to single-member district-plans. *See, e.g.*, Brief Amici Curiae On Behalf Of Congressman Louis Stokes, *et al.* at 12-15, *Voinovich v. Quilter*, S. Ct. No. 91-1618 (Sept. 11, 1992) (arguing that the three *Gingles* factors should not apply to a challenge to a single-member district plan); *Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992) (three-judge court) ("it is not entirely clear to what extent *Gingles* applies to . . . single member districts"), *cert. den.*, 61 U.S.L.W. 3334 (July 21, 1992).

The lower court in this case, for example, held that the districts in the single-member district reapportionment plan at issue violated Section 2 "in that the plaintiffs have shown that more . . . districts may be drawn" than were drawn. Tr. VIII, 82. The court believed that this evidence proved a Section 2 violation because—once political cohesion and racially polarized voting are shown —Section 2 requires nothing more than a demonstration that additional districts could have been, but were not, drawn. Relying on this rule, the court rejected the State's defense that, because the challenged plan provided each protected group with the opportunity to elect a pro-

a determination that the minority population is politically cohesive. The third *Gingles* factor requires a determination that, as a result of racially polarized voting, the white majority is usually able to defeat Hispanic candidates of choice. *Gingles*, 478 U.S. at 49-50.

[10] *Cf. Solomon v. Liberty County, Florida*, 899 F.2d 1012, 1017 (11th Cir. 1990) (*en banc*) (proof of the three *Gingles* factors is both necessary and sufficient to prevail on a Setcion 2 vote dilution claim) (Kravitch, J., concurring); *with id.* 1035-36 (proof of the three factors is necessary but then court must analyze the totality of the circumstances) (Tjoflat, J., concurring).

portionate number of candidates of choice, the asserted Section 2 claim must fail.

The approach taken by the district court in this case conflicts directly with two recent decisions—*Baird v. Indianapolis*, 976 F.2d 357 (7th Cir. 1992) (Easterbrook, J.), and *Nash v. Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992) (three-judge court). Both courts specifically rejected the maximization requirement imposed by the district court in this case. In *Nash*, the court explicitly held that "though the plaintiffs have proven more [minority] districts could have been drawn [in the single-member district plan] . . . this fact does not prove the . . . . plan violates the Act." *Nash*, 797 F. Supp. at 1496. In the recent *Baird* decision, the Seventh Circuit also rejected a maximization requirement, holding that "[u]nless black voters fare poorly compared with white voters in achieving their objectives (the election of the candidates they prefer), they have not stated a claim under [Section 2]." *Baird*, slip op. at 6. The *Baird* and *Nash* courts dismissed Section 2 challenges based on demonstrations that the challenged plans assured equal electoral opportunity.[11]

The widespread confusion as to the meaning of Section 2 in the single-member district context, and the direct conflict between the ruling below and the *Nash* and *Baird* decisions, makes clear that definitive guidance from this Court is needed.[12]

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[11] Whether, and to what extent, a jurisdiction must attempt to maximize the number of minority districts also is a critical issue in many of the pending redistricting cases in the lower courts. A key ssue in the on-going Texas legislative and congressional redistricting litigation, for example, is whether the State failed to maximize the number of majority-minority districts in its recently enacted plans. *Terrazas v. Slagle*, No. A-91-CA-426 (W.D. Tex.).

[12] The Voting Rights Act cases already before the Court this term do not present the opportunity to resolve these core issues. *See Quilter v. Voinovich*, 794 F. Supp. 760 (N.D. Ohio 1992) (three-judge court), *probable jurisdiction noted*, 112 S. Ct. 2299 (1992) (primary issue presented relates to whether a legislature must find that a prior redistricting plan was in violation of Section 2 prior to taking affirmative steps to establish a minority-majority district in a subsequent plan); *Emison v. Growe*, 782 F. Supp. 427 (D. Minn.) (three-judge court), *probable jurisdiction noted sub nom., Growe v. Emison*, 112 S. Ct. 1557 (1992) (primary issues presented relate to federalism and federal court/state court comity in the reapportionment context).

II. THE SECTION 2 STANDARDS APPLIED BY THE LOWER COURT IN THIS CASE MUST BE REJECTED.

This Court has recognized that a wide array of interests and policies must be a accommodated when a State weaves the compromises that will result in an acceptable reapportionment plan.[13] These legitimate considerations include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent" office holders. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). They also may include the fair allocation of political power among a State's diverse political, ethnic and racial communities. *See United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 167 (1977); *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973).

The standards applied by the lower court in this case, however, prevent a State from even considering such factors. As discussed above, the lower court believed that—if political cohesion and racially polarized voting are demonstrated—the failure to draw the maximum number of minority districts in a single-member district reapportionment plan is tantamount to a violation of

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[13] The Court has directed that a court must consider this compromise process when reviewing State action: "[i]n giving substance to the presumption of validity to which the [Florida redistricting plan] is entitled, it is important to remember that at every stage of its development it has constituted a "rough accommodation" of interests in an effort to arrive at practical and workable solutions." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55 (1973) (citations omitted).

Section 2. The district court reached this conclusion notwithstanding undisputed evidence that the minority group asserting the challenge constituted the majority of the voting age population in a proportionate number of house districts included in the State of Florida plan for the Dade County area—the area in which the group alleged the plan impermissibly diluted its voting strength.

In holding that maximization is required, the lower court did not even find it appropriate to evaluate the claims of two different protected classes simultaneously. This led the court to an anomalous result in its evaluation of the Florida state senate district plan: It found that both Hispanic and African-American plaintiffs had established Section 2 violations but that neither were remediable because the allocation of an additional district to either group would result in the loss of a district by the other group. Therefore, the court concluded that the reapportionment scheme it considered to be the best available nevertheless violated Section 2.

The maximization requirement imposed by the lower court must be rejected for two reasons.

First, such a requirement vitiates Congress's mandate that a court consider the "totality of the circumstances" when evaluating a Section 2 challenge. 42 U.S.C. § 1973. The lower court's exclusive focus on the treatment of one group in a redistricting plan without reference to the treatment of other groups and interests in that plan is improper because it does not permit an assessment of whether members of the protected class will have "less opportunity *than others* to participate in the electoral process and to elect representatives of their choice." *Id.* (emphasis added).

Second, the lower court's maximization requirement cannot be reconciled with the Section 2(b) proviso "[t]hat nothing in [Section 2] establishes a right to have members of a protected class elected in numbers equal to

their proportion in the population." 42 U.S.C. § 1973(b). In both *Baird v. Indianapolis*, *supra*, and *Nash v. Blunt*, *supra*, the courts relied on this proviso to dismiss Section 2 challenges because the plans at issue afforded the complaining minority groups proportional representation in all of the areas in which those plans were challenged. *Baird*, slip op. at 6; *Nash*, 797 F. Supp. at 1496. As Judge Easterbrook put it in the recent *Baird* decision, this proviso must mean not only that "a minority cannot win by proving that it is underrepresented, then resting . . . [it] also implies that [minorities] who have influence proportional to their numbers do not state a claim under" Section 2. *Baird*, slip op. at 6.

Judge Easterbrook's conclusion comports with the holding in *Gingles* that the Act is not violated where minority voters in a region can consistently elect representatives of their choice in proportion to minority population levels in that region. *See Gingles*, 478 U.S. at 77 (Brennan and White, JJ.) ("persistent proportional representation is inconsistent with [the] allegation that the ability of [minority] voters to elect candidates of their choice is not equal to that enjoyed by the White majority"); *id.* at 102 (O'Connor, J., Burger, C.J., Rehnquist, J. (now C.J.), and Powell, J.). *Accord Nash v. Blunt*, 797 F. Supp. at 1497-98 (proof of "persistent proportional representation" should defeat a Section 2 vote dilution claim); *Id.*, 797 F. Supp. at 1507 (Sachs, J., concurring) (no Section 2 violation because "a contrary ruling would force redistricters to grant more than proportional representation" to minority voters).

Thus, Section 2 cannot reasonably be read to require a minority group be allocated the maximum possible number of districts in a reapportionment plan, and the district court's conclusion that Section 2 does require such a result should be rejected.

Nor is it possible to justify the district court's ruling based on a theory that the state "intended" a discrimina-

tory result because it failed to maximize the number of minority-majority districts. A court evaluating whether a redistricting plan intentionally discriminates against a protected class must consider "the jurisdiction as a whole" because "States attempt to comply with the Voting Rights Act by creating conditions conducive to success by minorities throughout [that] jurisdiction." *Baird*, slip op. at 4. If the challenged plan provides the protected class an equal electoral opportunity by ensuring that it will have the opportunity to elect a proportionate number of candidates, that evidence cannot support an inference of intentional discrimination. *See Mobile v. Bolden*, 446 U.S. 55, 72 and n.17 (1980) (plurality opinion).

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Appellants' Jurisdicitonal Statement, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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